



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 138

Dispute resolution requirements for trustee companies providing traditional services

September 2010

About this paper

This consultation paper sets out ASIC's proposals on administering the new dispute resolution requirements for trustee companies providing traditional trustee company services (traditional services).

We seek feedback on our proposals from trustee companies providing traditional services, their clients, beneficiaries and other consumers, professional indemnity insurers and ASIC-approved external dispute resolution (EDR) schemes.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 17 September 2010 and is based on the Corporations Act as at 17 September 2010.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on dispute resolution requirements for trustee companies providing traditional trustee company services. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Business Cost Calculator Report and/or a Regulation Impact Statement: see [Section E Regulatory and financial impact](#), p. 37.

Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 11 November 2010 to:

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What will happen next?

Stage 1	17 September 2010	ASIC consultation paper released
Stage 2	11 November 2010 November 2010	Comments due on the consultation paper Drafting of amendments to RG 139 and RG 165
Stage 3	December 2010/January 2011	Release of updated RG 139 and RG 165

A Background to the proposals

Key points

From 1 May 2011, trustee companies providing traditional trustee company services (traditional services) must have a dispute resolution system that consists of:

- internal dispute resolution (IDR) procedures that meet standards and requirements made or approved by ASIC; and
- membership of an ASIC-approved external dispute resolution (EDR) scheme.

These new arrangements have implications for ASIC's two regulatory guides on dispute resolution:

- Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165); and
- Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes* (RG 139).

Regulation of trustee companies providing traditional services

- 1 The Council of Australian Governments agreed on 26 March 2008 that the Australian Government would assume responsibility for regulating traditional services provided by trustee companies.

Note: See Green Paper on *Financial Services and Credit Reform* (June 2008) at <http://www.treasury.gov.au/consumercredit/content/publications.asp>.

- 2 The *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* (Modernisation Act) was enacted on 6 November 2009. It amends the *Corporations Act 2001* (Corporations Act) to regulate traditional services provided by trustee companies as financial services under Chs 5D and 7 of the Corporations Act.

- 3 The Corporations Regulations 2010 (No. 3) (Amendment Regulations) were made on 6 May 2010. The Amendment Regulations update the Corporations Regulations 2001 (Corporations Regulations) for traditional services.

Note: Section 601RAB(1) of the Corporations Act provides that a trustee company is an entity that is prescribed by the regulations as a trustee company. The Corporations Regulations list the names of trustee companies providing traditional services for the purposes of s601RAB(1); see reg 5D.1.01(1) and Sch 8AA of the Corporations Regulations.

- 4 Traditional services provided by a trustee company are specifically included as a financial service under s766A(1A). This means that a trustee company providing traditional services will need to obtain an Australian financial

services (AFS) licence and be subject to the conduct obligations in Ch 7, including the obligation to have a compliant dispute resolution system.

Note 1: State and territory Public Trustees are excluded from the requirement to hold an AFS licence unless the Minister agrees to a request from a state or territory that a particular state or territory's Public Trustee be regulated by the Corporations Act: see reg 5D.1.01(2).

Note 2: Section 601RAC(1) defines traditional services as:

- (a) performing estate management functions (as defined in s601RAC(2));
- (b) preparing a will, a trust instrument, a power of attorney or an agency arrangement;
- (c) applying for probate of a will, applying for grant of letters of administration, or electing to administer a deceased estate;
- (d) establishing and operating common funds; and
- (e) any other services prescribed by the regulations for the purpose of s601RAC(1).

Note 3: Section 601RAC(3) and reg 5D.1.02 exclude certain activities from the definition of traditional services.

- 5 One of the reasons the Australian Government extended the dispute resolution system to cover traditional services was to ensure that complainants have access to timely, independent and cost-effective dispute resolution mechanisms when things go wrong—as an alternative to the high costs and delays of court.

Note: See *National regulation of trustee companies*, Senator The Hon Nick Sherry, Media Release No. 053, 7 May 2009.

What are the legislative requirements?

The dispute resolution requirements

- 6 Trustee companies providing traditional services must have an AFS licence authorising them to provide traditional services and, as an obligation of their licence, must meet the dispute resolution requirements: see s912A. Table 1 summarises the dispute resolution requirements for traditional services.
- 7 Transitional arrangements will apply to the dispute resolution requirements: see reg 6 of the Amendment Regulations. This means that the obligation to have a compliant dispute resolution system will only commence from 1 May 2011 for both:
- (a) existing AFS licensees who will be required to vary their AFS licence to cover traditional services or cease providing traditional services from 6 November 2010; and
 - (b) trustee companies that do not already hold an AFS licence, and who will be required to obtain an AFS licence to cover traditional services by 1 May 2011.

Table 1: Dispute resolution requirements for trustee companies providing traditional services

Requirements	Details	Reference
General	<p>Trustee companies providing traditional services must have a dispute resolution system that consists of:</p> <ul style="list-style-type: none"> • IDR procedures that comply with standards and requirements made or approved by ASIC; and • membership of an ASIC-approved EDR scheme. <p>The dispute resolution system must cover complaints made by retail clients.</p> <p>Retail clients include:</p> <ul style="list-style-type: none"> • individuals who are not professional investors (as defined by the Corporations Act) who have been provided with the traditional services; and • small businesses (as defined by the Corporations Act) that have been provided with the traditional services. 	<p>See s912A</p> <p>See s601RAB(3) and 761G(6); and regs 7.1.17C and 7.1.28A</p>
IDR procedures	<p>When considering whether to make or approve standards or requirements relating to IDR procedures, ASIC must take into account:</p> <ul style="list-style-type: none"> • Complaints Handling Standard AS ISO 10002-2006 <i>Customer satisfaction—Guidelines for complaints handling in organizations</i> (AS ISO 10002-2006); and • any other matter ASIC considers relevant. <p>ASIC's minimum requirements for IDR procedures are set out in RG 165.</p>	<p>See regs 7.6.02(1) and 7.9.77(1); and RG 165</p>
EDR schemes	<p>When deciding whether to approve an EDR scheme, ASIC must take into account the following matters:</p> <ul style="list-style-type: none"> • the accessibility of the scheme; • the independence of the scheme; • the fairness of the scheme; • the accountability of the scheme; • the efficiency of the scheme; • the effectiveness of the scheme; and • any other matter ASIC considers relevant. <p>ASIC's minimum requirements for approval of a scheme and a scheme's ongoing requirements are set out in RG 139.</p>	<p>See regs 7.6.02(3) and 7.9.77(3); and RG 139</p>

The types of persons the dispute resolution system must cover

- 8 The dispute resolution system for traditional services must cover 'retail clients', being:
- individuals who are not 'professional investors' (as defined by the Corporations Act) who have been provided with the traditional services; and

- (b) ‘small businesses’ (as defined by the Corporations Act) that have been provided with the traditional services.

Note 1: A ‘professional investor’ includes a person who holds an AFS licence, a person regulated by the Australian Prudential Regulation Authority (APRA), a person who controls at least \$10 million (including money held by an associate or under a trust that the person manages), a listed entity, etc: see s9.

Note 2: A ‘small business’ employs less than 100 people, where the business manufactures goods or includes the manufacture of goods, or otherwise employs less than 20 people: see s761G(12).

- 9 Table 2 summarises the types of small businesses or individuals who may be provided with the traditional services.

Table 2: The types of persons the dispute resolution system must cover

Category of client	Reference						
Individuals or small businesses who directly engage a trustee company to prepare: <ul style="list-style-type: none"> • a will; • a trust instrument; • a power of attorney; or • an agency arrangement. 	See s601RAB and reg 7.1.28A(b)						
Individuals or small businesses who do not directly engage the services of a trustee company, but who may request an ‘information return’. These persons include beneficiaries and certain other persons relating to charitable trusts and other trusts.	See regs 7.1.28A and 5D.2.01						
<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 33%; vertical-align: top;"><i>Beneficiaries:</i></td> <td style="width: 33%; vertical-align: top;"><i>Charitable trusts:</i></td> <td style="width: 33%; vertical-align: top;"><i>Other trusts:</i></td> </tr> <tr> <td style="vertical-align: top;"> <ul style="list-style-type: none"> • a beneficiary under a deceased’s will; • where a person died without a will, a person who has an entitlement or interest in the deceased’s estate under a state or territory law; or • a person who has commenced a proceeding in court under a state or territory law to be included as a beneficiary of a deceased’s estate. </td> <td style="vertical-align: top;"> <ul style="list-style-type: none"> • a settlor of a trust; • a person who has power to appoint or remove a trustee of the trust or vary any of the terms of the trust; or • a person named in the instrument establishing the trust as a person who must or may be consulted by the trustees before distributing or applying the trust money or property. </td> <td style="vertical-align: top;"> <ul style="list-style-type: none"> • a settlor; • a person who has power to appoint or remove a trustee or vary the terms of the trust; or • a beneficiary of the trust. </td> </tr> </table>	<i>Beneficiaries:</i>	<i>Charitable trusts:</i>	<i>Other trusts:</i>	<ul style="list-style-type: none"> • a beneficiary under a deceased’s will; • where a person died without a will, a person who has an entitlement or interest in the deceased’s estate under a state or territory law; or • a person who has commenced a proceeding in court under a state or territory law to be included as a beneficiary of a deceased’s estate. 	<ul style="list-style-type: none"> • a settlor of a trust; • a person who has power to appoint or remove a trustee of the trust or vary any of the terms of the trust; or • a person named in the instrument establishing the trust as a person who must or may be consulted by the trustees before distributing or applying the trust money or property. 	<ul style="list-style-type: none"> • a settlor; • a person who has power to appoint or remove a trustee or vary the terms of the trust; or • a beneficiary of the trust. 	
<i>Beneficiaries:</i>	<i>Charitable trusts:</i>	<i>Other trusts:</i>					
<ul style="list-style-type: none"> • a beneficiary under a deceased’s will; • where a person died without a will, a person who has an entitlement or interest in the deceased’s estate under a state or territory law; or • a person who has commenced a proceeding in court under a state or territory law to be included as a beneficiary of a deceased’s estate. 	<ul style="list-style-type: none"> • a settlor of a trust; • a person who has power to appoint or remove a trustee of the trust or vary any of the terms of the trust; or • a person named in the instrument establishing the trust as a person who must or may be consulted by the trustees before distributing or applying the trust money or property. 	<ul style="list-style-type: none"> • a settlor; • a person who has power to appoint or remove a trustee or vary the terms of the trust; or • a beneficiary of the trust. 					

- 10 Given the specific nature of traditional services, the Australian Government recognised the need to make special provision for beneficiaries so they may also access a trustee company’s dispute resolution system:

[c]oncerns have been expressed about the need for more cost-effective and timely alternative dispute resolution mechanisms for beneficiaries to enhance the protection available for trust assets. Currently, in the absence of internal dispute resolution services voluntarily provided by the trustee company, the Supreme Court is the only avenue of recourse for beneficiaries with concerns about the management of the trust or estate.

Note: Revised Explanatory Memorandum to the Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (Explanatory Memorandum), para 2.13, p. 37.

- 11 The rationale for this is explained further in the Explanatory Memorandum (para 7.26, p. 152):

[t]he beneficiary often has no contact with the trustee company prior to the will or trust coming into effect and after it does become operational, the beneficiary is generally unable to affect a change of the trustee company. While the main duty of a trustee is to administer the estate in accordance with the terms of the will or trust, regardless of the wishes of the beneficiary, once the will or trust comes into effect, it is the beneficiary that is ultimately interested in the proper and effective management of the estate. It is the beneficiary that bears the loss in the event of the mismanagement of the estate.

The provision of traditional services

- 12 Table 3 summarises the types of services covered as traditional services.

Table 3: Types of matters that are traditional services

Types of matters	Details	Reference
Estate management functions	Performing estate management functions. This includes acting as: <ul style="list-style-type: none"> • trustee of any kind, or administering or managing a trust; • executor or administrator of a deceased estate; • agent, attorney or nominee; • receiver, controller or custodian of property; and • manager or administrator (including in the capacity of guardian) of the estate of an individual, or any other matter—prescribed by the Corporations Regulations.	See s601RAC(1)(a) and 601RAC(2)
Wills, power of attorney, agency	Preparation of a: <ul style="list-style-type: none"> • will (i.e. codicil or other testamentary writing); • trust instrument; • power of attorney; or • agency arrangement. 	See s601RAC(1)(b)
Probate, grant of letters of administration, deceased estates	Applying for: <ul style="list-style-type: none"> • probate of a will; or • a grant of letters of administration or electing to administer a deceased estate. 	See s601RAC(1)(c)
Common funds	Establishing and operating a common fund—where funds or estate money from two or more estates administered by the trustee are pooled together for the purposes of investment. <p>Certain obligations attach to common funds, including:</p> <ul style="list-style-type: none"> • having a distinguishing fund number if more than one common fund is established by the trustee company; • keeping proper accounts; and • not contravening an express provision of the estate by putting estate money into a common fund. 	See s601RAC(1)(d)

Types of matters	Details	Reference
Other matters under the Corporations Regulations—Annual information returns	<p>Providing an information return, within 30 days of the request, to persons engaging the services of a trustee company <i>indirectly</i> (as listed in Table 2).</p> <p>This requirement applies from 1 July 2010, or once the traditional services have been provided (if after 1 July 2010).</p> <p>The information return must include information on:</p> <ul style="list-style-type: none"> • the income earned on the trust’s assets; • the expenses of the trust, including remuneration, commission or other benefits received by the trustee company; and • the net value of the trust’s assets. 	See s601RAC(1)(e); and regs 5D.2.01 and 5D.2.02

- 13 The Corporations Regulations also state when traditional services are *not* provided by a trustee company, including when the trustee company:
- (a) is named in a will as an executor, but is not actively providing a service or function; or
 - (b) is named in a power of attorney as an attorney, but is not actively providing a service or function.
- Note: See reg 5D.1.02 for a complete list of circumstances when a trustee company does not provide traditional services.

Guardianship complaints

- 14 Certain state and territory guardianship laws create a detailed ‘substitute decision-making’ regime for persons who are unable to make their own life decisions about important matters—whether because of intellectual disability, brain injury, dementia or mental illness.
- 15 Under the guardianship laws, a substitute decision-maker may be appointed to make lawful decisions about key life matters on behalf of persons who lack the mental capacity to do so. Where financial decisions are concerned, each state and territory’s guardianship laws generally allow for a trustee company (whether solely or jointly with a personal co-appointee) to act as an ‘administrator’ or ‘estate manager’ to manage the financial affairs or estate of a person lacking mental capacity.
- 16 A trustee company’s dispute resolution system does not need to cover complaints about traditional services provided by the trustee company as an administrator of an individual’s estate, where the complaint can be addressed under existing state and territory guardianship law complaint mechanisms.
- Note: See reg 7.6.02(6) and Sch 8AC of the Corporations Regulations, and item [4] of the Explanatory Statement to the Amendment Regulations, p. 9.
- 17 This means that the relevant state or territory court, tribunal or board that can handle complaints relating to the administration of estates for guardianship

purposes continues to have exclusive jurisdiction to handle the complaint. Table 4 summarises the existing complaint mechanisms for each state and territory.

Table 4: Existing complaint mechanisms under state and territory guardianship laws

No	State/Territory	Existing complaint mechanisms
1	ACT	<ul style="list-style-type: none"> • ACT Civil and Administrative Tribunal (ACAT) • Supreme Court (ACT)
2	NSW	<ul style="list-style-type: none"> • Guardianship Tribunal • Supreme Court (NSW)
3	NT	<ul style="list-style-type: none"> • Local Court • Supreme Court
4	Qld	<ul style="list-style-type: none"> • Queensland Civil and Administrative Tribunal
5	SA	<ul style="list-style-type: none"> • Guardianship Board • Supreme Court
6	Tas	<ul style="list-style-type: none"> • Guardianship Board • Supreme Court
7	Vic	<ul style="list-style-type: none"> • Victorian Civil and Administrative Tribunal (VCAT)
8	WA	<ul style="list-style-type: none"> • State Administrative Tribunal

- 18 The Australian Government’s rationale for exempting these types of matters from the coverage of a trustee company’s dispute resolution system includes:
- (a) to preserve the operation of specified state and territory laws, and consequently the jurisdiction of state and territory courts, tribunals and boards for guardianship matters; and
 - (b) to ensure there is no inconsistency in dispute resolution processes that apply to guardianship for trustee companies.

Note: See *Financial Services Modernisation Regulations—Seeking public comment*, Minister for Financial Services, Superannuation and Corporate Law, Media Release No. 12, 21 August 2009, and item [4] of the Explanatory Statement to the Amendment Regulations, p. 9.

Our regulatory guidance on dispute resolution

- 19 Our regulatory guidance on dispute resolution is set out in:
- (a) Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165); and
 - (b) Regulatory Guide 139 *Approval and oversight of external dispute resolution schemes* (RG 139).

- 20 Table 5 summarises the key minimum requirements in RG 165 and RG 139 that currently apply to the financial services and credit industries, and ASIC-

approved EDR schemes under the Corporations Act and *National Consumer Credit Protection Act 2009* (National Credit Act).

Note: RG 165 and RG 139 are available from the ASIC website at www.asic.gov.au/rg.

Table 5: ASIC’s key dispute resolution requirements for financial services and credit industries

Requirements	Details	Reference
IDR procedures	<p>Financial service providers, credit providers and credit assistance providers must have in-house complaints handling procedures or internal dispute resolution (IDR) procedures that:</p> <ul style="list-style-type: none"> • are free to complainants; • cover the majority of complaints ‘retail clients’ make; • adopt the following definition of ‘complaint’ in Complaints Handling Standard AS ISO 10002-2006: <ul style="list-style-type: none"> a complaint is an expression of dissatisfaction made to an organisation, related to its products or services, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected • satisfy the Guiding Principles in Section 4 of AS ISO 10002-2006 and the following sections of AS ISO 10002-2006: <ul style="list-style-type: none"> – Section 5.1—Commitment; – Section 6.4—Resources; – Section 8.1—Collection of information (which requires financial service providers to record complaints data); and – Section 8.2—Analysis and evaluation of complaints; and • appropriately document IDR procedures. 	RG 165
Membership of an EDR scheme	<p>Financial service providers, credit providers and credit assistance providers must:</p> <ul style="list-style-type: none"> • belong to one or more EDR schemes approved by ASIC; and • have appropriate links between their IDR procedures and EDR scheme (including a system for informing complainants about the availability of EDR and how to access it). <p>ASIC approves and oversees the EDR schemes in accordance with RG 139. The minimum requirements in RG 139 must be reflected in a scheme’s Constitution and/or Terms of Reference. The Constitution and Terms of Reference of the scheme bind each member by ‘special contract’ with the EDR scheme. In this way, members are required to comply with scheme determinations.</p> <p>Of relevance to members, EDR schemes must meet the following requirements:</p> <ul style="list-style-type: none"> • the EDR scheme reports to us: <ul style="list-style-type: none"> – systemic issues and serious misconduct; – general complaints information; and – information about complaints received and closed with an indication of the outcome against each scheme member in their annual report; • the EDR scheme covers complaints made by small businesses and individuals, and for credit, covers complaints made by those who have been provided with credit or credit services and guarantors; • the EDR scheme covers the vast majority of types of complaints in the relevant industry (or industries); and 	<p>RG 165</p> <p>RG 139</p>

Requirements	Details	Reference
	<ul style="list-style-type: none"> the EDR scheme operates a minimum compensation cap that is consistent with the nature, extent and value of consumer transactions in the relevant industry or industries. <p>Note: From 1 January 2012, a minimum compensation cap will apply of at least \$280,000 (or \$150,000 for general insurance broker complaints) for complaints involving monetary values of up to \$500,000.</p>	

ASIC-approved EDR schemes

- 21 Two ASIC-approved EDR schemes currently exist: the Financial Ombudsman Service Limited (FOS) and the Credit Ombudsman Service Limited (COSL).

Note: It is possible that a new EDR scheme may seek ASIC approval. The process for seeking our approval is set out in RG 139.

- 22 Trustee companies providing traditional services are likely to already be members of the Investments, Life Insurance and Superannuation (ILIS) stream of FOS if they provide other financial services, such as acting as a superannuation trustee, acting as a responsible entity for managed funds, providing custodial or depository services, or acting as a trustee for debenture holders.

The Superannuation Complaints Tribunal

- 23 The Superannuation Complaints Tribunal (SCT) is a statutory tribunal, established under the Superannuation (Resolution of Complaints) Act 1993 (Superannuation Complaints Act). The SCT operates differently to ASIC-approved EDR schemes in that:
- the SCT is not subject to ASIC's approval and RG 139 does not apply to it; and
 - the SCT only deals with complaints against trustees and certain insurers by virtue of the relevant provisions under the Superannuation Complaints Act.

Objectives of this consultation paper

- 24 This consultation paper addresses how we propose to update and refine the dispute resolution requirements in RG 165 and RG 139 to appropriately cover trustee companies providing traditional services.
- 25 The key objectives of this review are to:
- update RG 165 so trustee companies providing traditional services have IDR procedures that are in line with AS ISO 10002-2006; and

- (b) develop and refine existing approaches taken by EDR schemes to cover traditional services complaints. This may involve updating RG 139 to ensure that EDR schemes have sufficient coverage for traditional services complaints.

26 The proposals in this paper:

- (a) anticipate that the policy settings in RG 165 and RG 139 will broadly apply to trustee companies providing traditional services. However, special requirements or modifications may be required to ensure that:
 - (i) traditional services complaints made by beneficiaries are handled appropriately where a final outcome at IDR or EDR may affect other beneficiaries; and
 - (ii) schemes cover the vast majority of types of traditional services complaints—this relates to whether compensation awards are consistent with the nature, extent and value of traditional services complaints and the exclusions that may legitimately apply to an EDR scheme’s jurisdiction; and
- (b) assume that the Terms of Reference of the schemes will continue to allow the schemes to handle complaints relating to events that predate the date of membership of the scheme (subject to the time limits for bringing a complaint to EDR in RG 139).

27 In developing the proposals in this paper, we have drawn on our experience in administering the dispute resolution requirements in RG 165 and RG 139.

B IDR: Making dispute resolution work for traditional services complaints

Key points

Our proposals on how to update and refine our IDR requirements in RG 165 for traditional services relate to four key issues:

- setting a timeframe for trustee companies to handle traditional services complaints in a responsive and timely manner;
- where complaints involve more than one beneficiary, whether trustee companies should notify other interested parties (including beneficiaries) that a complaint has been received and at other key stages of the IDR process to ensure procedural fairness;
- when additional clarification might be required on how certain court processes should interact with IDR; and
- whether all other dispute resolution requirements in RG 165 should apply to trustee companies providing traditional services.

Maximum timeframes for handling traditional services complaints at IDR

Proposal

- B1** We propose that trustee companies must address all traditional services complaints within a maximum 45-day timeframe at IDR, and give a final response or notification of delay within this time.

Your feedback

- B1Q1 Do you agree with Proposal B1? If not, why not?
- B1Q2 Are there any circumstances where a 45-day timeframe is not appropriate? Please give details.

Rationale

- 28 We consider IDR to be an important and necessary first step in the dispute resolution process. This is so that a financial service provider has an opportunity to hear client concerns and expressions of dissatisfaction and address them genuinely, efficiently and effectively. Addressing complaints at IDR in this way can also assist a financial service provider to improve their business systems and services, which are integral to growing a successful business.
- 29 RG 165 currently provides that, as part of the Guiding Principle of Responsiveness in Section 4 of AS ISO 10002-2006, financial service providers should be responsive to a complaint (i.e. immediately

acknowledge receipt of the complaint, or if this is not possible, acknowledge receipt of the complaint as quickly as possible).

- 30 RG 165 also states our expectation that complainants be given a timely response at IDR (i.e. the complaint is handled within a maximum 45 days at IDR). This is because independent research reveals that the timely resolution of complaints, particularly at IDR, can be instrumental in consumers being satisfied with the complaints handling process.

Note: See paragraphs 15–21 of Consultation Paper 102 *Dispute resolution—Review of RG 139 and RG 165* (CP 102).

- 31 Currently, the maximum 45-day timeframe at IDR does not affect the maximum 90 days a trustee of a superannuation fund or a retirement savings account provider has to handle an inquiry or complaint under s101 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) or s47 of the *Retirement Savings Accounts Act 1997* (RSA Act) respectively.

- 32 While we consider a maximum 90 days at IDR to be too long for handling traditional services complaints, we recognise that 45 days may be too short, particularly if other interested persons or more than one beneficiary is involved. This is because a claim by one beneficiary may potentially affect the entitlements of other beneficiaries. Appropriate handling of the complaint in a procedurally fair manner would require the trustee company to:

- (a) properly identify all other affected parties and notify them of the receipt of the complaint in a timely manner; and
- (b) consider such parties' views when addressing the complaint.

Handling the complaint in this way may not be possible within a maximum 45 days at IDR.

IDR and complaints involving other beneficiaries

Proposal

B2 We propose to update RG 165 to require trustee companies to give written notice to all other reasonably identifiable interested parties (including beneficiaries) within a reasonable time from when a complaint is received at IDR and at other key stages of the IDR process. The other key stages include:

- (a) when a final response is given within the maximum timeframe; or
- (b) when the complainant is notified of a delay at IDR.

Your feedback

B2Q1 Do you agree with Proposal B2? If not, why not?

- B2Q2 If you agree with this proposal, do you consider 28 days is a reasonable time for a trustee company to identify and give written notice to all other interested parties (including beneficiaries)? If not, why not, and what would be a more appropriate timeframe?
- B2Q3 Are there other key stages during the IDR process when written notification should be given to other interested parties? If so, when and why?
- B2Q4 Should more prescriptive guidance be given in RG 165 to require trustee companies to also:
- (a) give written notice of the nature of the complaint received and the final outcome of the complaint at IDR; and
 - (b) inform other beneficiaries that they have the right to complain to an EDR scheme and the name and relevant contact details of the EDR scheme?
- If not, why not? Should any other more prescriptive guidance be given? Please provide reasons for your views.

- B3 We also propose to update RG 165 to require trustee companies to consider the views of all other interested parties (including other beneficiaries) to ensure that complaints are handled fairly, efficiently and effectively at IDR.

Your feedback

- B3Q1 Do you agree with Proposal B3? If not, why not?

Rationale

- 33 When a trustee company manages an estate or is an executor of a will, several beneficiaries may be involved.
- 34 RG 165 does not currently provide guidance on how complaints involving multiple beneficiaries should be handled at IDR.
- 35 In the superannuation context, under s24A of the Superannuation Complaints Act, a trustee of a superannuation fund has 28 days from the receipt of a complaint to notify other persons who the trustee believes, after reasonable inquiry, would have an interest in the complaint.

IDR and certain court processes

- 36 We consider that special guidance may be required where two types of court processes interact with traditional services complaints at IDR:
- (a) when a person has commenced legal proceedings to be included as a beneficiary; and

- (b) when a trustee company has applied to a state or territory court for an opinion, advice or direction on questions concerning the management or administration of a trust property.

Persons who have commenced legal proceedings to be included as a beneficiary

Proposal

- B4** We propose to update RG 165 to require trustee companies to:
- (a) put on hold any related complaints at IDR that may be dependent on a court deciding whether another person should be included as a beneficiary until the court hands down its decision; and
 - (b) notify all related complainants in writing of the reasons for the complaint being put on hold.

Your feedback

B4Q1 Do you agree with Proposal B4? If not, why not?

B4Q2 Do you consider that our guidance should specify a timeframe within which written notification should be given, and also require trustee companies to advise all related complainants of the details of the legal proceedings? If not, why not?

Rationale

- 37 We consider that putting complaints on hold until a court has determined whether a person will be included as a beneficiary will allow more efficient and effective complaints handling. To proceed with the complaint before a court has determined this issue could result in the complaint having to be dealt with again at IDR.

Seeking an opinion, advice or direction from a court

Proposal

- B5** We propose to update RG 165 to acknowledge that trustee companies may first obtain an opinion, advice or direction from a court, if this is necessary to address the traditional services complaint or related complaints at IDR.

Your feedback

B5Q1 Do you agree with Proposal B5? If not, why not?

B5Q2 Do you consider that the maximum timeframes at IDR, discussed at Proposal B1, should allow for complaints to be put on hold until the court opinion, advice or direction is received? If not, why not?

Rationale

38 A trustee company may apply to a court for an opinion, advice or direction on questions concerning the management or administration of a trust property.

Note: See s63, *Trustee Act 1958* (NSW); s96, *Trusts Act 1973* (Qld); s91, *Trustee Act 1936* (SA); Rules of the Supreme Court (Vic.) O55 r3; s92, *Trustees Act 1962* (WA); s63, *Trustee Act 1925* (ACT); and s47, *Trustee Act 1898* (Tas.).

39 The receipt of such an opinion, advice or direction may be relevant to the handling of certain complaints at IDR.

40 We consider that the efficient and effective handling of traditional services complaints may best be achieved at IDR if the handling of the complaint, or other related complaints, are put on hold until the court opinion, advice or direction is received.

Application of RG 165 to trustee companies providing traditional services

Proposal

B6 Other than our proposals at B1–B5, we propose to update RG 165 so that it is clear that the dispute resolution requirements in RG 165 apply to traditional services complaints.

Your feedback

B6Q1 Do you agree with Proposal B6? If not, why not? Please identify where you consider RG 165 should not apply, or where modifications should be made. Please provide reasons for your views.

Rationale

41 Other key dispute resolution requirements in RG 165 that would apply to traditional services complaints would include requiring trustee companies to:

- (a) adopt the definition of ‘complaint’ in AS ISO 10002-2006;
- (b) adopt the Guiding Principles at Section 4 of AS ISO 10002-2006 and the following sections of AS ISO 10002-2006:
 - (i) Section 5.1—Commitment;
 - (ii) Section 6.4—Resources;
 - (iii) Section 8.1—Collection of information; and
 - (iv) Section 8.2—Analysis and evaluation of complaints;
- (c) have appropriate links between IDR and EDR processes; and
- (d) have an appropriate system for recording complaints.

Note: See RG 165.80-165.87, and Appendix 1 of RG 165.

C EDR: Scheme coverage for traditional services complaints

Key points

Under RG 139, EDR schemes are required to handle the vast majority of types of complaints in the financial services or credit industries they cover and award compensation up to an amount that is consistent with the nature, extent and value of client transactions in the industry.

Our proposals on EDR scheme coverage for traditional services relate to five key issues:

- setting a minimum compensation cap for traditional services complaints;
- adopting an approach so EDR outcomes can be binding on more than one beneficiary;
- the extent to which current legitimate EDR scheme exclusions should continue to apply for traditional services complaints;
- whether new EDR scheme exclusions are appropriate for traditional services complaints; and
- how EDR schemes should handle complaints involving a trustee company acting jointly with a co-personal appointee.

Setting a minimum compensation cap at EDR for traditional services complaints

Proposal

- c1** We propose that from 1 May 2011 (when the dispute resolution requirements start for traditional services), when a complaint is brought by a client who has directly engaged the services of a trustee company, an ASIC-approved EDR scheme should:
- (a) be able to handle the traditional services complaint if it involves monetary amounts of \$500,000 or less; and
 - (b) be able to award compensation of at least \$280,000 per claim.

Your feedback

C1Q1 Do you agree with Proposal C1? If not, why not? Where possible, please provide statistical data to support your view.

- c2** We are considering two options when a traditional services complaint is brought by a beneficiary. From 1 May 2011, an ASIC-approved EDR scheme should *either*:
- (a) be able to handle the traditional services complaint according to the compensation cap described at Proposal C1; or
 - (b) be able to:

- (i) handle the traditional services complaint if it involves monetary amounts of \$10 million or less; and
- (ii) award compensation of at least \$1 million per claim.

Your feedback

C2Q1 At what level should a scheme's compensation cap be set for traditional services complaints brought by a beneficiary? Should the compensation cap be the same as Proposal C1 or should a higher cap apply? Please provide reasons, and where possible statistical data to support your view.

C2Q2 If you consider that a higher cap should apply, do you agree with the higher cap suggested at Proposal C2, or should a cap set at an intermediate level apply? Please provide reasons, and where possible statistical data to support your view.

C2Q3 Should the higher cap be limited to traditional services complaints where there is a dispute between beneficiaries' competing interests (e.g. the allocation of assets within an estate)? The compensation cap at Proposal C1 would then apply to all other beneficiary complaints (e.g. alleged mismanagement of the estate by the trustee). Please provide reasons.

C2Q4 Do you consider that Proposal C1 or the higher cap at C2Q2 should apply to complaints brought by settlors or other persons who can appoint or remove a trustee, or vary the trust instrument, under a charitable or other trust? Please provide reasons, and where possible statistical data to support your view.

- c3** We propose to review the adequacy of the compensation cap at Proposals C1 and C2 in two years from the start of the dispute resolution requirements for trustee companies (i.e. in May 2013).

Your feedback

C3Q1 Do you agree with Proposal C3? If not, why not?

Rationale

- 42 Currently, for an EDR scheme to be ASIC-approved, it must be able to award compensation up to a capped amount that is consistent with the nature, extent and value of client transactions in the relevant industry or industries the scheme covers: see RG 139.154–139.160 and RG 139.175–139.189.
- 43 From 1 January 2010 to 31 December 2011, EDR schemes are required to accept and handle complaints where the value of the claim involved is \$500,000 or less. However, the scheme can only award compensation up to a capped amount. What that amount is will depend on the different monetary limits the scheme used to operate before 1 January 2010: e.g. for most complaints at FOS, award up to \$280,000 per claim, except for (a) claims

relating to managed investments, stockbroking, securities or any derivative products and financial planning (award up to \$150,000), and (b) except for most claims against a general insurance broker (award up to \$100,000).

44 From 1 January 2012, all schemes will be required to:

- (a) allow complainants access to the scheme where the value of a claim does not exceed \$500,000; and
- (b) be able to award compensation of at least \$280,000 (unless the complaint relates to general insurance brokers, for which compensation of at least \$150,000 must be available).

Note: Some streams of FOS already meet this requirement.

45 Under this compensation cap approach:

- (a) separate claims cannot be aggregated for the purposes of awarding compensation;
- (b) schemes must be able to award interest or earnings in addition to the compensation cap; and
- (c) the compensation cap of \$280,000 must be indexed every three years from 1 January 2012 by the higher of the increase in the consumer price index (CPI) or male total average weekly earnings (MTAWE).

Note: See RG 139.175–RG 139.189 for further information on these requirements.

46 On the evidence we currently have we consider the cap mentioned at paragraph 44 would be consistent with the nature, extent and value of most claims brought by direct clients of traditional services as the types of claims are likely to be similar to claims currently brought by consumers and investors in relation to other financial services and products. If you have evidence to suggest that this is not the case we would appreciate receiving it.

47 We consider that an initial threshold of \$500,000, and compensation capped at \$280,000, may not appropriately cover claims brought by a beneficiary (whether or not more than one beneficiary is interested in the complaint).

48 In determining at what level a more appropriate higher compensation cap for complaining beneficiaries should be set, we consider the following should be taken into account:

- (a) the Australian Government's reasons for bringing beneficiaries within the dispute resolution system;
- (b) that the definition of 'retail client' includes beneficiaries who are individuals who control up to \$10 million and small businesses;
- (c) the nature, value and extent of complaints involving beneficiaries; and
- (d) the impact a higher cap may have on compensation arrangements.

Note: A consultation paper on compensation arrangements for trustee companies will be released shortly.

- 49 We consider that an initial \$10 million threshold would be consistent with the current approach in RG 139 (where a complainant can access a scheme if the value of their claim does not exceed \$500,000). The \$500,000 amount is linked to the value of most products under the retail client test at s761G. The proposed \$10 million amount for traditional services is linked to the maximum amount of money a retail client can control under s761G(12), and reg 7.1.17C, which modifies the definition of 'retail client' for traditional services.
- 50 We base the proposed requirement to be able to award compensation of at least \$1 million to the complaining beneficiary on most wills or estates under management, including the family home and a mix of other assets (i.e. shares, superannuation entitlements, bank account savings and other investments).
- 51 We also base a proposed \$1 million compensation cap on:
- (a) the Australian Bureau of Statistics survey on Household Wealth and Wealth Distribution conducted in 2005–06 (cat no. 6554.0), which reported that Sydney households have an average net worth of \$697,000; and
 - (b) the HILDA survey on Families, Incomes and Jobs in 2009, which reported that:
 - (i) the average household net worth of Australians in 2006 was \$664,867; and
 - (ii) the average household net worth of 45–54 year olds in 2006 was \$821,500, and for 55–64 year olds was \$1,029,598, after which assets are drawn on for the retirement life stage.
- Note: This measure is based on assets minus debts, and the 2010 statistics will only be available in 2012.
- 52 We consider that a \$1 million cap may be appropriate for complaints brought by a beneficiary as household wealth is likely to have increased since 2006, notwithstanding the likely effects of the global financial crisis.

Waiver and deed of release at the beginning of the EDR process where beneficiaries have differing interests in the complaint

Background

- 53 We anticipate that ASIC-approved EDR schemes will receive a diverse range of traditional services complaints, including complaints:
- (a) made by retail clients who have directly engaged the trustee company to prepare a will, trust instrument, power of attorney or agency arrangement;

- (b) made by a sole beneficiary;
- (c) made by a beneficiary, where other beneficiaries under the estate are interested in the complaint; and
- (d) made by certain persons (i.e. settlors of the trust, or persons who have the power to appoint or remove a trustee, or vary the trust terms) relating to a charitable or other trust.

- 54 Currently, scheme complaints handling processes, as set out in a scheme's Constitution and Terms of Reference, are based on:
- (a) the Constitution and Terms of Reference forming a special contract between each scheme member and the scheme; and
 - (b) complaints generally being raised by a client who has directly engaged the services of the relevant financial services provider who is a member of the scheme.

- 55 RG 139 currently requires that an EDR scheme outcome should not bind the complainant if they do not choose to accept it. However, if the complainant accepts the EDR scheme outcome, the scheme or member may require the complainant to accept the EDR outcome in full and final satisfaction of the claim, so the EDR outcome is binding on both parties (i.e. the balance of the claim cannot be pursued in another forum, such as a court of competent jurisdiction).

Note: See RG 139.175–RG 139.189 for further information on this requirement.

- 56 Where traditional services complaints involve more than one beneficiary, an EDR scheme recommendation or determination about the entitlements of one beneficiary may potentially affect another or all other beneficiaries' entitlements. This will particularly be the case where one beneficiary's interests differ from another's and relate to a finite pool of assets. For these types of complaints, waiver and deed of release by the complaining beneficiary at the end of the EDR process (if the complainant accepts the scheme outcome) may lead to further complaints by other affected beneficiaries if the other affected beneficiaries do not agree to the EDR scheme outcome.

- 57 We consider, therefore, that a modified waiver and deed of release approach in RG 139 is required for complaints where one beneficiary makes a complaint and one or more other beneficiaries have a different interest in the outcome to the complaining beneficiary.

Note: There may be some types of complaints involving life tenants and capital beneficiaries where agreement to taking part in an EDR scheme process may be unlikely (e.g. the favoured party has no interest in taking part).

Proposal

C4 We propose that:

- (a) an EDR scheme should not handle a complaint involving more than one beneficiary unless all beneficiaries *first agree* to the scheme's jurisdiction and being bound by the ultimate outcome able to be achieved by the scheme (if an outcome is achieved); and
- (b) after the complaint has been assessed as being within the scheme's jurisdiction, the scheme would have the discretion to discontinue handling the complaint if at any stage, after all parties have first agreed to the scheme's jurisdiction and the final outcome at EDR, the scheme forms the view that a court would be the more appropriate forum in the circumstances.

Your feedback

C4Q1 Do you agree with Proposal C4? If not, why not?

C4Q2 Do you consider there are more efficient and effective ways to modify the waiver and deed of release approach than Proposal C4? Please provide reasons for your view.

Rationale

58 Upfront agreement to the scheme's jurisdiction would save the scheme from investing time and resources in handling the complaint where one or more beneficiaries is likely to refuse to give a waiver or deed of release once the scheme has made a determination. It would enable beneficiary parties to more quickly go to court if the scheme cannot handle the complaint.

59 We understand that this approach may be unsatisfactory to some stakeholders, as beneficiaries would be bound to accept the ultimate scheme result, even if they later find they do not like it at the end of the EDR process. Waiver and deed of release at the start of the EDR process would mean that the complainant and other interested parties would lose their right to complain to a court if they are dissatisfied with the final outcome achieved at EDR.

Note: Waiver and deed of release would not apply if no final outcome is achieved at EDR because the scheme exercised its discretion to discontinue handling the complaint.

60 Under this approach, we anticipate that there may be few complaints where all beneficiaries agree to be bound at the beginning of the scheme process, although this may be more likely where fewer beneficiaries are interested in the complaint. Agreement may only be reached when other beneficiaries consider that the complainant has the means and a real intention to go to court, and where significant costs to the estate may be incurred.

61 In addition, some beneficiaries may be minors or lack the mental capacity to give a waiver and deed of release: see also Proposal C6(b).

Current legitimate exclusions from EDR scheme jurisdiction for traditional services

Proposal

- C5** We propose to update RG 139 to confirm that the existing legitimate exclusions at RG 139.173 apply to traditional services complaints.

Your feedback

C5Q1 Do you agree with Proposal C5? If not, why not?

- C6** We also propose that the following three legitimate exclusions in an EDR scheme's Terms of Reference may apply to traditional services complaints:

- (a) complaints relating to the management of a common fund as a whole;
- (b) complaints that would more appropriately be dealt with by a court (e.g. where a complainant or an interested beneficiary is a minor or lacks mental capacity; and
- (c) complaints relating to the level of a fee or charge—unless they relate to non-disclosure, misrepresentation or incorrect application of the fee or charge; or where the complaint concerns a breach of any legal obligation or duty on the part of the trustee company.

Your feedback

C6Q1 Do you agree with Proposal C6? If not, why not?

C6Q2 Do you agree that where a complaining beneficiary or an interested beneficiary is a minor (i.e. under 18 years of age) or lacks mental capacity, the scheme can assess the complaint as being more appropriately dealt with by a court? If not, why not?

C6Q3 Can a scheme assess the complaint as being appropriately dealt with by a court where not all beneficiaries are known?

C6Q4 Do you consider there are other current exclusions in the FOS Terms of Reference that should apply or be refined for traditional services complaints? If so, what are they and how should they be refined?

Rationale

- 62 For an EDR scheme to be ASIC-approved, and remain ASIC-approved, it must cover the vast majority of types of consumer complaints in the relevant industry or industries they cover: see RG 139.154–139.174. This means exclusions should be kept to a minimum.
- 63 However, EDR schemes may, under their Terms of Reference, legitimately exclude certain types of complaints from jurisdiction, including:
- (a) complaints that have already been 'dealt with' in another forum (i.e. a decision on the merits having been made by a court, tribunal or another ASIC-approved EDR scheme);

- (b) complaints that relate solely to the member's commercial policy (unless they involve the responsible lending requirements for credit and margin lending financial services);
- (c) complaints that relate solely to the underlying performance of an investment; and
- (d) complaints that are frivolous and vexatious.

Note: See RG 139.173. These legitimate exclusions are currently reflected in the FOS Terms of Reference at paragraphs 5.1 and 5.2. A copy of the current FOS Terms of Reference is available at the FOS website: see <http://www.fos.org.au>.

Complaints relating to the management of a fund as a whole

- 64 Under paragraph 5.1(i) of the FOS Terms of Reference, FOS may exclude complaints relating to the 'management of a fund as a whole'. The FOS Operational Guidelines clarify that 'management of a fund as a whole' includes decisions made about the day-to-day operation of the fund or scheme that apply to all members of the fund, including investment decisions made by a manager.
- 65 Under s601SCA, a trustee company may pool together into a 'common fund' estate money for two or more estates administered by the trustee company for investment.
- 66 In managing a common fund, the trustee company must:
- (a) if more than one common fund is established, ensure that each fund has a distinguishing fund number;
 - (b) keep proper accounts for each common fund; and
 - (c) not contravene an express provision of the estate by putting estate money into a common fund.
- Note: See s601SCB.
- 67 Section 601SCC and Sch 2 of the Amendment Regulations set more specific requirements about how trustee companies must manage common funds. These requirements commenced on 1 July 2010 and include:
- (a) trustee companies must ensure that their board puts in writing decisions relating to certain key matters, including trustee company decisions on the investment strategy for a common fund and the type of expert advice to be sought about proposed investments;
 - (b) trustee companies may only enter into a derivative when managing and administering a common fund in certain circumstances; and
 - (c) trustee companies must not apply income from the investment for a common fund other than to pay the trustee company's fees for the proper administration and management of the fund.

Note: See regs 5D.2.05 and 5D.2.06.

68 We consider that decisions about the management of a fund as a whole involve largely commercial decisions that should generally be left to a trustee company. Therefore these types of complaints should be legitimately outside the scope of an EDR scheme's jurisdiction.

Complaints more appropriately dealt with in court

69 Under paragraph 5.2(a) of the FOS Terms of Reference, FOS may exercise its discretion to exclude from its jurisdiction complaints that may be more appropriately dealt with in another forum—that is, by a court, tribunal, another ASIC-approved EDR scheme or the Privacy Commissioner. This discretion may be exercised at any point during the handling of a claim by the scheme.

70 There may be traditional services complaints where a person challenges the validity of a later will (that does not include them as a beneficiary) on grounds that the testator lacked mental capacity at the time the later will was made. We consider that these types of complaints may be legitimately excluded from EDR scheme jurisdiction on grounds that they are more appropriately dealt with in another forum (i.e. a court).

71 This is because:

- (a) before the EDR scheme could handle the complaint, the person seeking to be included as a beneficiary would need to commence legal proceedings before they could be covered by the trustee company's dispute resolution system; and
- (b) proper handling of the complaint would require a detailed assessment of the facts and witness testimony (including the testimony of medical experts) to properly ascertain whether the testator lacked mental capacity at the time the later will was made. As EDR schemes are not bound by strict evidentiary requirements, a court would be the more appropriate forum to handle the complaint.

72 We consider that where a complaining beneficiary or one or more interested beneficiaries are minors (i.e. under 18 years of age) or lack mental capacity, the scheme should assess the complaint as being more appropriately dealt with in court. This is because courts have established processes to appoint or remove a 'litigation guardian' for a minor or person lacking mental capacity.

Complaints relating to the level of fee charged by a trustee company

73 Under paragraph 5.1(b) of the FOS Terms of Reference, FOS may not consider a complaint about the level of a fee, premium, charge or interest rate—unless the complaint relates to the non-disclosure, misrepresentation or incorrect application of the fee, premium, charge or interest rate, taking into account any scale or practices generally applied by the trustee company; or where the complaint concerns a breach of any legal obligation or duty on the part of the trustee company.

- 74 Part 5D.3 of the Corporations Act requires trustee companies to meet certain disclosure requirements and requirements relating to the types and amounts of fees a trustee company may charge. In particular, s601TEA empowers a court to review certain fees and reduce them if considered ‘excessive’ in accordance with the specific considerations listed at s601TEA(3). The court may review excessive fees either on its own motion or on the application of ASIC or any beneficiary.
- 75 Section 601TEA also clarifies that, if a court reduces the fees charged by more than 10%, the trustee company must pay the costs of the review, unless the court considers special circumstances apply.
- 76 We note that s601XAA expressly provides that, where an excessive fee is charged and the excessive fee is paid by a person, the amount of the excess is recoverable as a loss.
- 77 We consider that in the absence of a breach of a legal obligation the amount of a fee, premium, charge or interest rate payable, is of itself, largely a commercial decision that should be left to a trustee company. Therefore these types of complaints should be legitimately outside the scope of an EDR scheme’s jurisdiction.

New EDR scheme exclusions for traditional services complaints

Proposal

- c7 We propose to update RG 139 so that an EDR scheme’s Constitution and/or Terms of Reference may include the following four new legitimate exclusions for traditional services complaints:
- (a) complaints where a court would not normally consider or resolve the issue;
 - (b) complaints or aspects of a complaint that a state or territory court, tribunal or board would be able to handle under guardianship laws;
 - (c) assuming Proposal C4 is adopted, certain complaints involving more than one beneficiary where all beneficiaries do not first agree that the scheme can handle the complaint; and
 - (d) complaints where the substance of the complaint has been resolved by a legal direction given by a court to the trustee and the complaint does not raise post-court directions issues.

Your feedback

c7Q1 Do you agree with Proposal C7? If not, why not?

- C7Q2 For Proposal C7(b), do you consider that the same types of persons who have standing in a state or territory court, tribunal or board for administration related complaints should also be able to complain to an EDR scheme about Corporations Act or *Australian Securities and Investments Commission Act 2001* (ASIC Act) related issues if the state or territory court, tribunal or board is unable to address them? Please provide reasons for your views.
- C7Q3 Should there be any other new legitimate exclusions from EDR scheme jurisdiction for traditional services complaints? If so, what are they and why?

Rationale

- 78 Given the unique nature of traditional services complaints, RG 139 may need to be updated to allow a scheme's Constitution and/or Terms of Reference to include some additional legitimate exclusions.

Complaints where a court would not consider or resolve the issue

- 79 The exercise of a trustee's discretion will generally not be reviewed by a court if:
- (a) there has been no bad faith;
 - (b) the discretion was exercised after real and genuine consideration (including consideration of the right question). Did the trustee give fair and proper consideration to the exercise of the discretion? This may involve an interpretation of the terms of the trust to determine whether the trustee directed itself to questions that were different to the questions the trust deed required them to consider; and
 - (c) the discretion was exercised in accordance with the purpose for which it was conferred.

If the trustee has disclosed the reasons for the exercise of its discretion, the court will consider whether those reasons are sound: *Rapa v Patience* (unreported, NSWSC, McLelland J, 4 April 1985), *Karger v Paul* [1984] VR 161.

- 80 We consider that an EDR scheme could decide not to handle complaints in these circumstances.

Complaints where a state or territory court, tribunal or board has exclusive jurisdiction to handle the complaint

- 81 A trustee company's dispute resolution system does not need to cover complaints about traditional services provided by the trustee company as an administrator or 'manager' of an individual's estate where the complaint may be addressed under existing state or territory guardianship law complaint mechanisms.

- 82 This means that, where a state or territory court, tribunal or board is able to handle the complaint involving the administration of an individual's estate, that state or territory court, tribunal or board will continue to have exclusive jurisdiction to handle the complaint. We consider that these types of complaints should be legitimately excluded from an EDR scheme's jurisdiction.
- 83 However, there may be some aspects of some complaints involving the administration or management of an individual's estate under state or territory guardianship laws that a state or territory court, tribunal or board may not be able to fully address. Such aspects of a complaint may include:
- (a) issues of unconscionable conduct and/or other matters regulated by the consumer protection provisions in the ASIC Act;
 - (b) issues of guardianship money in a common fund and the obligations relating to common fund management under the Corporations Act not being met; or
 - (c) issues of fees charged to clients who are under a guardianship order and the obligations for charging fees under the Corporations Act not being met.
- 84 If this arises in practice, we propose that EDR schemes should be able to handle those aspects of the complaint relating to Corporations Act or ASIC Act issues. We expect EDR schemes to cooperate with the relevant state or territory court, tribunal or board to address such cases, should they arise by, for example, handling the Corporations Act/ASIC Act aspect of the complaint simultaneously, or after the relevant state or territory court, tribunal or court has first handled the related aspect of the complaint.

EDR scheme coverage where trustee companies act jointly with a personal co-appointee

Proposal

- c8** We propose to update RG 139 to state that EDR schemes must handle certain types of complaints involving loss caused by the actions of trustee companies acting jointly with personal co-appointees, including:
- (a) where the complaint relates solely to the trustee company's acts (and the state or territory legislation modifies the common law); or
 - (b) where the complaint relates to the conduct of both the trustee company and the personal co-appointee, and the personal co-appointee consents to the EDR scheme's jurisdiction.

Your feedback

C8Q1 Do you agree with Proposal C8? If not, why not?

Rationale

- 85 We understand that, in some cases, a trustee company is appointed with another personal co-appointee.
- 86 In these circumstances, under the common law, trustee companies are jointly and severally liable for any loss occasioned by breach of trust: see *Cockburn v GIO Finance Ltd (No. 2)* (2001) 51 NSLR 624.
- 87 We also understand that certain state or territory trustee laws *modify the general law* so a trustee company will only be accountable for its acts occasioning loss.

D EDR: Other requirements for traditional services

Key points

Our other EDR proposals for traditional services relate to four key issues:

- legal proceedings and EDR;
- time limits for bringing a traditional services complaint to EDR;
- EDR scheme reporting of traditional services complaints; and
- the application of RG 139 to traditional services complaints.

Legal proceedings and complaints at EDR

Proposal

D1 We propose to update RG 139:

- (a) to require an EDR scheme to update its Constitution or Terms of Reference to clarify that, once a person commences legal proceedings to be included as a beneficiary under an estate, it will put on hold all related traditional services complaints that may depend on the outcome of the legal proceedings until the court hands down its decision; and
- (b) to require trustee companies to notify their EDR scheme as soon as they become aware that a person has commenced legal proceedings to be included as a beneficiary.

Your feedback

D1Q1 Do you agree with Proposal D1? If not, why not?

Rationale

88 Under RG 139, the Terms of Reference of an EDR scheme must provide that a scheme member cannot commence legal proceedings for a complaint once a complaint has been lodged at EDR unless:

- (a) the legal limitations period is about to expire; or
- (b) the complaint involves a test case situation or ‘novel’ point of law requiring clarification.

89 This is reflected in paragraphs 10.1, 10.2 and 13.1 of the FOS Terms of Reference.

90 A person who is not currently a beneficiary but seeks to be included as a beneficiary under an estate must first commence legal proceedings before being able to be covered by a trustee company’s dispute resolution system.

Time limits for bringing traditional services complaints to EDR

Proposal

- D2 We propose to update RG 139 to clarify that the timeframe for bringing a traditional services complaint to EDR is the later of either:
- (a) six years from the date the client first became aware (or should have reasonably become aware) that they suffered the loss; or
 - (b) two years from when the trustee company gives a final response at IDR.

Your feedback

D2Q1 Do you agree with Proposal D2? If not, why not? Please provide reasons for your response.

Rationale

- 91 RG 139 sets out the minimum timeframes for bringing a complaint to EDR.
- 92 Section 601XAA provides that a person has six years from when the cause of action arises to bring a claim for loss or damage suffered as a result of the trustee company contravening a provision of Ch 5D.

EDR scheme reporting

Proposal

- D3 We propose to update RG 139 to require EDR schemes to also collect and record complaints information for traditional services complaints:
- (a) broken down by direct and indirect clients (as described in Table 2) for the types of information listed at RG 139.139(a)–(f);
 - (b) specifying the number of traditional services complaints put on hold and for how long because a person commenced legal proceedings to be included as a beneficiary; and
 - (c) specifying the number of traditional services complaints received that fell outside the scheme's Terms of Reference for the legitimate exclusions proposed at Proposals C5–C7.

Your feedback

D3Q1 Do you agree with Proposal D3? If not, why not?

D3Q2 Do you consider there should be any other new or refined EDR scheme reporting requirements in RG 139 for traditional services complaints? Please provide reasons for your views.

Rationale

- 93 RG 139 sets out our EDR scheme reporting requirements: see RG 139.109–RG 139.146. In particular, EDR schemes must collect and record certain types of information about complaints in accordance with RG 139.139.

Application of RG 139 to traditional services complaints

Proposal

- D4 Other than our proposals at Section C and at D1–D3, we propose that the requirements in RG 139 should apply to EDR schemes handling traditional services complaints.

Your feedback

- D4Q1 Do you agree with Proposal D4? If not, why not?
- D4Q2 Do you consider that any other sections of RG 139 require modification for EDR schemes covering traditional services complaints? Please provide reasons for your view.

E Regulatory and financial impact

- 94 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:
- (a) ensuring that clients of trustee companies providing traditional services have access to accessible, independent, fair, accountable, efficient and effective dispute resolution processes; and
 - (b) not causing trustee companies providing traditional services, and their EDR schemes, to incur unreasonable costs in complying with the dispute resolution requirements.
- 95 Before settling on a final policy, we will comply with the requirements of the Office of Best Practice Regulation (OBPR) by:
- (a) considering all feasible options;
 - (b) if regulatory options are under consideration, undertaking a preliminary assessment of the impacts of the options on business and individuals or the economy;
 - (c) if our proposed option has more than low impact on business and individuals or the economy, consulting with OBPR to determine the appropriate level of regulatory analysis; and
 - (d) conducting the appropriate level of regulatory analysis, that is, complete a Business Cost Calculator report (BCC report) and/or a Regulation Impact Statement (RIS).
- 96 All BCC reports and RISs are submitted to the OBPR for approval before we make any final decision. Without an approved BCC Report and/or RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.
- 97 To ensure that we are in a position to properly complete any required BCC report or RIS, we ask you to provide us with as much information as you can about:
- (a) the likely compliance costs;
 - (b) the likely effect on competition; and
 - (c) other impacts, costs and benefits,
- of our proposals or any alternative approaches: see 'The consultation process' p. 4.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries out a financial services business to provide financial services <p>Note: This is a definition contained in s761A of the Corporations Act.</p>
Amendment Regulations	Corporations Regulations 2010 (No. 3)
AS ISO 10002-2006	Australian Standard AS ISO 10002-2006 <i>Customer satisfaction—Guidelines for complaints handling in organizations</i> (ISO 10002:2004, MOD)
ASIC	Australian Securities and Investments Commission
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7), unless otherwise specified
complainant	A person or company who at any time: <ul style="list-style-type: none"> (a) has made a complaint to an AFS licensee, credit licensee, unlicensed product issuer, unlicensed secondary seller, unlicensed COI lender or any other person or business who must have IDR procedures that meet ASIC's approved standards and requirements; or (b) has lodged a complaint with a scheme about a scheme member that falls within the scheme's Terms of Reference or Rules
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001, as amended by the Amendment Regulations
COSL	Credit Ombudsman Service Limited—an ASIC-approved EDR scheme
EDR	External dispute resolution
EDR scheme (or scheme)	An external dispute resolution scheme approved by ASIC under the Corporations Act (see s912A(2)(b) and 1017G(2)(b)) and/or the National Consumer Credit Protection Act 2009 (see s11(1)9a) in accordance with our requirements in RG 139
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
FOS	Financial Ombudsman Service—an ASIC-approved EDR scheme

Term	Meaning in this document
guardianship laws	The state and territory laws listed at Sch 8AC of the Corporations Regulations
IDR	Internal dispute resolution
IDR procedures, IDR processes or IDR	Internal dispute resolution procedures/processes that meet the requirements and approved standards of ASIC under RG 165
Modernisation Act	<i>Corporations Legislation Amendment (Financial Services Modernisation) Act 2009</i>
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
reg 16 (for example)	A regulation of the Corporations Regulations (in this example numbered 16), unless otherwise specified
retail client	A client as defined in s761G of the Corporations Act and Pt 7.1 Div 2 of the Corporations Regulations
RG 165	An ASIC regulatory guide (in this example numbered 165)
s601RAB (for example)	A section of the Corporations Act (in this example numbered 601RAB), unless otherwise specified
scheme member (or member)	An industry participant who is a member of an ASIC-approved EDR scheme
SCT	Superannuation Complaints Tribunal, established under the <i>Superannuation (Resolution of Complaints) Act 1993</i>
small business	A small business as defined in s761G of the Corporations Act
Superannuation Complaints Act	<i>Superannuation (Resolution of Complaints) Act 1993</i>
Terms of Reference	The document that sets out an EDR scheme's jurisdiction and procedures, and to which scheme members agree to be bound. In some circumstances it might also be referred to as the scheme's 'Rules'
traditional services	Traditional trustee company services—has the meaning given in s601RAC(1) of the Corporations Act
trustee company	Has the meaning given in s601RAB of the Corporations Act

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose that trustee companies must address all traditional services complaints within a maximum 45-day timeframe at IDR, and give a final response or notification of delay.</p>	<p>B1Q1 Do you agree with Proposal B1? If not, why not?</p> <p>B1Q2 Are there any circumstances where a 45-day timeframe is not appropriate? Please give details.</p>
<p>B2 We propose to update RG 165 to require trustee companies to give written notice to all other reasonably identifiable interested parties (including beneficiaries) within a reasonable time from when a complaint is received at IDR and at other key stages of the IDR process. The other key stages include:</p> <p>(a) when a final response is given within the maximum timeframe; or</p> <p>(b) when the complainant is notified of delay at IDR.</p>	<p>B2Q1 Do you agree with Proposal B2? If not, why not?</p> <p>B2Q2 If you agree with this proposal, do you consider 28 days is a reasonable time for a trustee company to identify and give written notice to all other interested parties (including beneficiaries)? If not, why not, and what would be a more appropriate timeframe?</p> <p>B2Q3 Are there other key stages during the IDR process when written notification should be given to other interested parties? If so, when and why?</p> <p>B2Q4 Should more prescriptive guidance in RG 165 be given to require trustee companies to also:</p> <p>(a) give written notice of the nature of the complaint received and the final outcome of the complaint at IDR; and</p> <p>(b) inform other beneficiaries that they have the right to complain to an EDR scheme and the name and relevant contact details of the EDR scheme?</p> <p>If not, why not? Should any other more prescriptive guidance be given? Please provide reasons for your views.</p>
<p>B3 We also propose to update RG 165 to require trustee companies to consider the views of all other interested parties (including other beneficiaries) to ensure that complaints are handled fairly, efficiently and effectively at IDR.</p>	<p>B3Q1 Do you agree with Proposal B3? If not, why not?</p>
<p>B4 We propose to update RG 165 to require trustee companies to:</p> <p>(a) put on hold any related complaints at IDR that may be dependent on a court deciding whether another person should be included as a beneficiary until the court hands down its decision; and</p> <p>(b) notify all related complainants in writing of the reasons for the complaint being put on hold.</p>	<p>B4Q1 Do you agree with Proposal B4? If not, why not?</p> <p>B4Q2 Do you consider that our guidance should specify a timeframe within which written notification should be given, and also require trustee companies to advise all related complainants of the details of the legal proceedings? If not, why not?</p>

Proposal	Your feedback
<p>B5 We propose to update RG 165 to acknowledge that trustee companies may first obtain an opinion, advice or direction from a court, if this is necessary to addressing the traditional services complaint or related complaints at IDR.</p>	<p>B5Q1 Do you agree with Proposal B5? If not, why not?</p> <p>B5Q2 Do you consider that the maximum timeframes at IDR discussed at Proposal B1 should be put on hold until the court opinion, advice or direction is received? If not, why not?</p>
<p>B6 Other than our proposals at B1-B5, we propose to update RG 165 so that it is clear that the dispute resolution requirements in RG 165 apply to traditional services.</p>	<p>B6Q1 Do you agree with Proposal B6? If not, why not? Please identify where you consider RG 165 should not apply, or where modifications should be made. Please provide reasons for your views.</p>
<p>C1 We propose that from 1 May 2011 (when the dispute resolution requirements start for traditional services), when a complaint is brought by a client who has directly engaged the services of the trustee company, an ASIC-approved EDR scheme should:</p> <p>(a) be able to handle the traditional services complaint if it involves monetary amounts of \$500,000 or less; and</p> <p>(b) be able to award compensation of at least \$280,000 per claim.</p>	<p>C1Q1 Do you agree with Proposal C1? If not, why not? Where possible, please provide statistical data to support your view.</p>
<p>C2 We propose that from 1 May 2011, when a traditional services complaint is brought by a beneficiary, an ASIC-approved EDR scheme should <i>either</i>:</p> <p>(a) be able to handle the traditional services complaint according to the compensation cap described in Proposal C1; or</p> <p>(b) be able to:</p> <p>(i) handle the traditional services complaint if it involves monetary amounts of \$10 million or less; and</p> <p>(ii) award compensation of at least \$1 million per claim.</p>	<p>C2Q1 At what level should a scheme's compensation cap be set for traditional services complaints brought by a beneficiary? Should the compensation cap be the same as Proposal C1 or should a higher cap apply? Please provide reasons, and where possible, statistical data to support your view.</p> <p>C2Q2 If you consider that a higher cap should apply, do you agree with the higher cap suggested at Proposal C2, or should a cap set at an intermediate level apply? Please provide reasons, and where possible statistical data to support your view.</p> <p>C2Q3 Should the higher cap be limited to traditional services complaints where there is a dispute between beneficiaries' competing interests (e.g. the allocation of assets within an estate)? The compensation cap at Proposal C1 would then apply to all other beneficiary complaints (e.g. alleged mismanagement of the estate by the trust). Please provide reasons.</p> <p>C2Q4 Do you consider that Proposal C1 or the higher cap at C2Q2 should apply to complaints brought by settlors or other persons who can appoint or remove a trustee, or vary the trust instrument, under a charitable or other trust?</p>

Proposal	Your feedback
	Please provide reasons, and where possible statistical data to support your view.
<p>C3 We propose to review the adequacy of the compensation cap at Proposals C1 and C2 in two years from the start of the dispute resolution requirements for trustee companies (i.e. in May 2013).</p>	<p>C3Q1 Do you agree with Proposal C3? If not, why not?</p>
<p>C4 We propose that:</p> <p>(a) an EDR scheme should not handle a complaint involving more than one beneficiary unless all beneficiaries <i>first agree</i> to the scheme’s jurisdiction and being bound by the ultimate outcome able to be achieved by the scheme (if an outcome is achieved); and</p> <p>(b) after the complaint has been assessed as being within the scheme’s jurisdiction, the scheme would have the discretion to discontinue handling the complaint if at any stage, after all parties have first agreed to the scheme’s jurisdiction and the final outcome at EDR, the scheme forms the view that a court would be the more appropriate forum in the circumstances.</p>	<p>C4Q1 Do you agree with Proposal C4? If not, why not?</p> <p>C4Q2 Do you consider there are more efficient and effective ways to modify the waiver and deed of release approach than Proposal C4? Please provide reasons for your view.</p>
<p>C5 We propose to update RG 139 to confirm that the existing legitimate exclusions at RG 139.173 apply to traditional services complaints.</p>	<p>C5Q1 Do you agree with Proposal C5? If not, why not?</p>
<p>C6 We also propose that the following three legitimate exclusions in an EDR scheme’s Terms of Reference may apply to traditional services complaints:</p> <p>(a) complaints relating to the management of a common fund as a whole;</p> <p>(b) complaints that would more appropriately be dealt with by a court (e.g. where a complainant or an interested beneficiary is a minor, or lacks mental capacity, and/or all beneficiaries are unknown or uncertain, because some may not yet be born); and</p> <p>(c) complaints relating to the level of a fee or charge—unless they relate to non-disclosure, misrepresentation or incorrect application of the fee or charge; or where the complaint concerns a breach of any legal obligation or duty on the part of the trustee company.</p>	<p>C6Q1 Do you agree with Proposal C6? If not, why not?</p> <p>C6Q2 Do you agree that where a complaining beneficiary or an interested beneficiary is a minor (i.e. under 18 years of age) or lacks mental capacity, the scheme can assess the complaint as being more appropriately dealt with by a court? If not, why not?</p> <p>C6Q3 Can a scheme assess the complaint as being appropriately dealt with by a court where not all beneficiaries are known?</p> <p>C6Q4 Do you consider there are other current exclusions in the FOS Terms of Reference that should apply or be refined for traditional services complaints? If so, what are they and how should they be refined?</p>

Proposal	Your feedback
<p>C7 We propose to update RG 139 so that an EDR scheme's Constitution and/or Terms of Reference may include four new legitimate exclusions for traditional services complaints:</p> <ul style="list-style-type: none"> (a) complaints where a court would not normally consider or resolve the issue; (b) complaints or aspects of a complaint that a state or territory court, tribunal or board would be able to handle under guardianship laws; (c) assuming Proposal C4 is adopted, certain complaints involving more than one beneficiary where all beneficiaries do not first agree that the scheme can handle the complaint; and (d) complaints where the substance of the complaint has been resolved by a legal direction given by a court to the trustee and the complaint does not raise post-court directions issues. 	<p>C7Q1 Do you agree with Proposal C7? If not, why not?</p> <p>C7Q2 For Proposal C7(b), do you consider that the same types of persons who have standing in a state or territory court, tribunal or board for administration related complaints should also be able to complain to an EDR scheme about Corporations Act or <i>Australian Securities and Investments Commission Act 2001</i> (ASIC Act) related issues if the state or territory tribunal or board is unable to address them? Please provide reasons for your views.</p> <p>C7Q3 Should there be any other new legitimate exclusions from EDR scheme jurisdiction for traditional services complaints? If so, what are they and why?</p>
<p>C8 We propose to update RG 139 to state that EDR schemes must handle certain types of complaints involving loss caused by the actions of trustee companies acting jointly with personal co-appointees, including:</p> <ul style="list-style-type: none"> (a) where the complaint relates solely to the trustee company's acts (and the state or territory legislation modifies the common law); or (b) where the complaint relates to the conduct of both the trustee company and the personal co-appointee and the personal co-appointee consents to the EDR scheme's jurisdiction. 	<p>C8Q1 Do you agree with Proposal C8? If not, why not?</p>
<p>D1 We propose to update RG 139:</p> <ul style="list-style-type: none"> (a) to require an EDR scheme to update its Constitution or Terms of Reference to clarify that, once a person commences legal proceedings to be included as a beneficiary under an estate, it will put on hold all related traditional services complaints that may depend on the outcome of the legal proceedings until the court hands down its decision; and (b) to require trustee companies to notify their EDR scheme as soon as they become aware that a person has commenced legal proceedings to be included as a beneficiary. 	<p>D1Q1 Do you agree with Proposal D1? If not, why not?</p>

Proposal	Your feedback
<p>D2 We propose to update RG 139 to clarify that the timeframe for bringing a traditional services complaint to EDR is the later of either:</p> <p>(a) six years from the date the client first became aware (or should have reasonably become aware) that they suffered the loss; or</p> <p>(b) two years from when the trustee company gives a final response at IDR.</p>	<p>D2Q1 Do you agree with Proposal D2? If not, why not? Please provide reasons for your response.</p>
<p>D3 We propose to update RG 139 to require EDR schemes to also collect and record complaints information for traditional services complaints:</p> <p>(a) broken down by direct and indirect clients for the types of information listed at RG 139.139(a)-(f);</p> <p>(b) about the number of traditional services complaints put on hold and for how long because a person commenced legal proceedings to be included as a beneficiary; and</p> <p>(c) the number of traditional services complaints received that fell outside the scheme's Terms of Reference for the legitimate exclusions proposed at Proposals C5-C7.</p>	<p>D3Q1 Do you agree with Proposal D3? If not, why not?</p> <p>D3Q2 Do you consider there should be any other new or refined EDR scheme reporting requirements in RG 139 for traditional services complaints? Please provide reasons for your views.</p>
<p>D4 Other than our Proposals at Sections C and D1-D3, we propose that the requirements in RG 139 should apply to EDR schemes handling traditional services complaints.</p>	<p>D4Q1 Do you agree with Proposal D4? If not, why not?</p> <p>D4Q2 Do you consider that any other sections of RG 139 require modification for EDR schemes covering traditional services complaints? Please provide reasons for you view.</p>